Office of Chief Counsel
Internal Revenue Service

memorandum

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KHill

date: January 22, 2001

to: Dan Coulter, Mgr. Grp. 43 and Randy Blair, R.O.

from: Kay Hill, Attorney

subject: [redacted] Levy

This memorandum serves the purpose of addressing two questions stemming from the Service's levy on distributions from the [redacted] Litigation, including:

1. Whether a levy using Form 668-A and addressed to [redacted] served to attach to all future distributions coming out of the [redacted] Litigation where distributions are being made over a period of years from two qualified settlement funds administered by [redacted], an attorney employed by [redacted]?

2. Whether use by the I.R.S. of new Forms 668-A, with an updated computer disk to reflect current amounts due and a change in addressee to specify the "[redacted]" and fund administrator's name constitutes the making of a new levy, triggering the notice requirements of RRA '98?

Based upon the discussion presented below, we reach the following conclusions:

1. The levy addressed to [redacted] attached to future payments coming from both funds.

2. A new "levy" is not made where a new Form 668-A is served to update a previous form, attaching a disk reflecting current balances due for the same taxpayers and periods previously listed and where the words "[redacted], [redacted], Administrator" are added to the name of the addressee, "[redacted]", on the original levy.

FACTS

The [redacted] ran aground near [redacted], [redacted] on [redacted], and the ensuing [redacted] generated a multitude of lawsuits filed against [redacted], [redacted], [redacted] and the owners of the [redacted] ("[redacted]"). [redacted] State court proceedings were consolidated under the name [redacted], Case No. [redacted] Civil. Federal litigation in the United States District Court for the District of [redacted] was consolidated under the name [redacted], Case No. [redacted] Civil. Numerous classes of plaintiffs were certified, including a [redacted] class, an [redacted] class and a [redacted] class.

In [redacted], the State of [redacted] and the United States settled their claims for at least $[redacted], which [redacted] agreed to pay to [redacted]. [redacted] paid about $[redacted] in settlements to various private claimants, including $[redacted] to the "[redacted]", [redacted]. [redacted] and [redacted] also settled the claims against them early in the proceedings. A jury trial in the United States District Court on the claims against the remaining defendants was held from [redacted]. On [redacted], [redacted] and the [redacted] reached a $[redacted] settlement for lost [redacted]. [redacted] members of the class opted out of that settlement and later entered a settlement agreement for $[redacted].

The trial in the federal court was divided into [redacted]. First, a jury found the [redacted]. Then, on [redacted], the jury found [redacted] for [redacted] in the approximate amount of $[redacted], representing damage associated with [redacted] (including reduced sales price for [redacted] and devaluation of [redacted] and [redacted]). Concluding the [redacted] of the trial, on [redacted], the jury awarded $[redacted] in [redacted]. [redacted] then filed numerous motions and appealed the [redacted] award. Final judgment, which included prejudgment interest and costs, was entered in [redacted].

A majority of the claimants entered into a Joint Prosecution Agreement in order to present a focused case to the jury and to reach an equitable means of distributing any

recovery. In essence, the claimants reached a sharing agreement under which each claimant will receive a proportion of total recovery from all defendants based upon his allowed damage claim divided by the total amount of damage claims. The damage claims were divided into [redacted] broad categories and then organized into a "[redacted]". An "[redacted]" which incorporated the [redacted], was approved by the court on [redacted], and several distribution plans were approved on [redacted]. The [redacted] appealed the approval of the [redacted] because it excluded them. On [redacted], the [redacted] reversed the District Court's approval of the plan and remanded it for inclusion of the [redacted]. At present, [redacted]'s appeal of the [redacted] award remains in the [redacted] Court of Appeals.

Through the course of the litigation, [redacted] have been distributed to the various claimants. One of the first [redacted] established was the "[redacted]". This [redacted] was administered by the Washington, D.C. [redacted] of [redacted]. By court order dated [redacted], the "[redacted]" was established, for $[redacted], representing [redacted] but not [redacted]. Most of the [redacted] distributions have been completed. By court order dated [redacted], the "[redacted]" was established, for amounts due from [redacted] as a result of the jury award and settlement agreements. To date, the only amount transferred by [redacted] to the fund is $[redacted], which represents the amount it agreed to pay to the [redacted] and the [redacted] members of that class who opted out. It is anticipated that this amount will be distributed this month. Much larger distributions are anticipated thereafter.

The administrator of both the [redacted] and the [redacted] is [redacted], of the [redacted] of [redacted]. [redacted] uses a computer system to organize the various classes of plaintiffs in the [redacted] Litigation, based on the court-approved "[redacted]". [redacted] confirms the amount of the individual's damage claim, assigns the claimant an identification number and then places the claimant into the [redacted]. For each distribution proposed for a particular [redacted], [redacted] sends computer disks to the various entities which have served notice of levy on the claims, which contain a listing of the individuals for whom a payout will be made. The entities respond with an updated disk listing current amounts owed by those individuals. To

assist it in maintaining a current database, [redacted] requests that the entities provide monthly update disks.

The I.R.S. has served several Forms 668-A in connection with the litigation. In [redacted], a Form 668-A addressed to the [redacted] of "[redacted]", with disk, was served for the purpose of attaching distributions coming from the [redacted] fund. That levy has been honored. Beginning in [redacted], the Service has served a series of Forms 668-A addressed to "[redacted]". The first such form was dated [redacted], with additional forms dated [redacted], [redacted], [redacted], [redacted] and [redacted]. The last such form was dated [redacted] and, unlike the previous forms, was addressed to "[redacted]". The I.R.S. then suspended delivering any additional Forms 668-A to [redacted], due to RRA '98 concerns by the Collection Division. Upon receipt of these forms, [redacted] issued checks to the Service which, to date, represented funds owing from the [redacted].

The computer inventory control system used by [redacted] overwrites its old data for a particular class of claimants every time a new Form 668-A is submitted by the I.R.S. Recently, [redacted] advised that it would not accept further Forms 668-A addressed to "[redacted]" because their system required identification of the settlement fund attached by the levy. This is because the [redacted] will now begin making distributions from the second fund it administers. [redacted] has requested that the Service update its disk, accompanied by a new Form 668-A identifying it as attaching to the "[redacted]", and then providing monthly updates. Collection personnel are reluctant to do so, because of their concern that service of a new Form 668-A without following the notice requirements of RRA '98 will cause them to violate the law. As some of the collection statutes have expired since the [redacted] Form 668-A was served, the Service would like to rely on that earlier document as constituting a levy which attached not only to [redacted], but also [redacted].

DISCUSSION

Issue 1. The [redacted] levy attached to all recoveries out of the [redacted] Litigation and succeeding Forms 668-A were updates of this earlier levy as to names and periods listed on the earlier disk.

Pursuant to the provisions of I.R.C. § 6321, a federal tax lien attaches to all property and rights to property of the taxpayer. The question of whether a federal or state law right constitutes property or rights to property under § 6321 is an issue of federal law. United States v. National Bank of Commerce, 472 U.S. 713 (1985). When Congress uses the term "property" broadly, as it did in § 6321, it intends to reach every possible property right or interest protected by law and having an exchangeable value. Drye v. United States, 120 S.Ct. 474 (1999).

A "chose in action" is a personal right not reduced to possession which is recoverable by a suit at law, including a right to recover for a tort (injury). Black's Law Dictionary, (West Publishing), 241 (6th ed. 1990). When the [redacted], a chose in action arose in favor of all those injured by [redacted]. Under [redacted] law, this right is considered to be property. In re Raihl, 152 B.R. 615 (9th Cir. B.A.P. 1993); Bergen v. F/V St. Patrick, 686 F.Supp. 786 (D. Ak 1988). Federal tax liens attach to choses in action. United States v. Citizers and Southern National Bank, 538 F.2d 1101, 1105, cert. denied, 430 U.S. 945 (1977). Had the I.R.S. decided to do so, it could have levied upon each claimant's chose in action anytime after the [redacted]. United States v. Stonehill, 96-1 U.S.T.C. (CCH) ¶ 50,318 (9th Cir. 1996), cert. denied, 117 S.Ct. 480 (1996). The government also could have pursued the action to judgment, even though the taxpayer did not want to do so himself. The value of the chose in action would be dependent upon the strength of the taxpayer's claim.

However, the Service pursued another course and levied upon "[redacted]". I.R.C. § 6332(a) requires any person "in possession of (or obligated with respect to) property or rights to property subject to levy which have been levied upon, to surrender the same. Since [redacted] actually possesses any funds only periodically, we look to whether it is deemed to be "obligated" with respect to the future distributions. In order to determine whether [redacted] is obligated, we first look to Treas. Reg. § 301.6331-1(a)(1), which provides, in part, that:

> a levy extends only to property possessed and obligations which exist at the time of the levy. Obligations exist when the liability of the obligor is fixed and determinable although the right to receive payment thereof may be deferred until a later date.

In your situation, [redacted] is the primary obligated party, as the defendant against whom the tort claims existed. However, federal law provides that a tortfeasor's obligation can transfer to the fund administrator when a qualified settlement fund is established by court order. Cf. I.R.C. § 468B(d)(2). Here, this occurred on [redacted]. [redacted]'s obligations were then extinguished, and the fund (a separate entity taxable as a trust) assumed those obligations. The Service's first levy, made on [redacted], attached to any of [redacted]'s obligations transferred to the fund which were "fixed and determinable", as required by the regulations. Of course, this first levy was taxpayer and period-specific, attaching only with respect to the periods listed on the attached disk.

An obligation is considered "fixed and determinable" when:

> the events which gave rise to the obligation have occurred and the amount of the obligation is capable of being determined in the future....

United States v. Antonio, 91-2 U.S.T.C. (CCH) ¶ 50,482 (D. Hawaii 1991), footnote 2. It does not matter that the amount of the claim is disputed at the time of the levy. Antonio, supra. The amount of the claim may be uncertain so long as, at the time the notice of levy is served, "the sum is capable of precise measurement in the future". United States v. Hemmen, 51 F.3d 883, 890 (9th Cir. 1995). Compare Tull v. United States, 69 F.3d 394 (9th Cir. 1995), where an auctioneer did not have a fixed and determinable right for payment under a contract because the facts of both a buyer and a price were as yet undetermined.

The events giving rise to [redacted]'s obligation occurred on the date of [redacted]. On that date the damage caused by [redacted] was done and the facts relevant to the dollar measure of the injury were established. All that remains to be done is the calculation of each claimant's share of recovery, which awaits the final determination of the

amount of [redacted]. Once the amount of [redacted] are decided, the total sum owing to each claimant will be known. Accordingly, [redacted]'s, and therefore the [redacted]'s, obligation met the criteria for being fixed and determinable before the date of the Service's earliest levy on [redacted].

[redacted]'s request that the next update be addressed to the "[redacted]" raises a question as to whether the pre-98 "levies" were addressed properly. We see no reason why the omission from the address of [redacted]'s name is fatal to the validity of the "levies". It would be splitting hairs to make the argument that [redacted] and not the [redacted] of [redacted] was the proper addressee. Furthermore, the failure to specify a particular fund is also not fatal. IRM 5.11.2.1.2(3) provides that additional identifying information may be listed on the Notice of Levy if such information "will help identify the taxpayer's property". This provision is only permissive. There is no requirement in the statute or the regulations that the property being attached by levy be described in the levy. We conclude that the [redacted] form was sufficient to attach to both funds.

2. A new Form 668-A, with an updated [redacted] disk reflecting current amounts due for the same taxpayers and periods listed on the original Form 668-A serves as a mere update of the [redacted] levy and does not constitute a new, post-RRA '98 levy.

The Internal Revenue Service Restructuring Act of 1998 ("RRA '98"), Pub.L. 105-206, considerably changed collection procedures, enacting new provisions I.R.C. §§ 6320 and 6630. The provisions are generally effective for notices of federal tax lien and levies and seizures which occur after January 18, 1999. If the service of additional Forms 668-A constitutes the service of a new "levy" as to the names and periods listed in disks served prior to the effective date, these provisions will apply to require the Service to re-notice the taxpayers of its intent to levy and appeal rights.

We are convinced that the effect of service of the first [redacted] levy was to attach all future distributions from both funds. Where a taxpayer has an unqualified fixed right, under a trust or a contract, or through a chose in action, to receive periodic payments or distributions of property, the Service has taken the position that a notice of levy is

effective to reach, in addition to payments or deductions then due, any subsequent payments or distributions that will become due thereafter. Rev. Rul. 55-210, 1955-1 CB 544.

Several manual provisions confirm that updates to an original levy can be effectuated by serving succeeding Forms 668-A. A levy which, among other things, reaches a series of future payments is not considered a repeated levy requiring managerial approval. IRM 5.11.1.3.7(1)e. The Service has many tape exchange agreements between district offices and the states. IRM, Handbook No. 105.3, Locating Taxpayers, 2.7.3. The procedures for implementing these "SITLP" agreements make it clear that the first tape or disk served constitutes the "levy", with subsequent tapes constituting mere "updates". IRM, Handbook No. 5.1, Agreements with the States, Section 13.7.

From this, we conclude that the series of Forms 668-A issued to [redacted] after the first Form was issued constitute updates to the [redacted] levy as to any names and periods reflected on the first Form. Prior to the effective date of RRA '98, the succeeding forms and disks served a dual purpose--constituting a "levy" for the new names and periods which were added and constituting an "update" for previously listed taxpayers and periods. The Service's accommodation of [redacted]'s request to update its previous levy with a more specific address and current balances due does not constitute a new levy which triggers the RRA '98 notice requirements. There is nothing in RRA '98 nor Service policy which requires the I.R.S. to apply the new notice requirements to a levy which was served before the January 18, 1999, effective date. [1]

In particular, we conclude the following RRA '98 requirements are not applicable for the taxpayers and periods listed on the [redacted] disk:

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[1] See also CCA 1999-40031 (July 1, 1999), concluding that nothing in RRA '98 prohibited proceeding with a sale noticed before the date of enactment but suspended due to the taxpayer's bankruptcy and an internal audit until after the enactment date.

a. New Warning of Enforcement Action, IRM Ex. 5.11.1-3

If a notice of intent to levy is over 180 days old, the Service has administratively determined that the taxpayer will get a new warning of enforcement action before the notice of levy is issued. IRM 5.11.1.2.2.6(2)a. The term "enforcement action" means the making of seizures and service of notices of levy. Id. Since the "levy" on the [redacted] Litigation proceeds occurred in [redacted] and before the January 18, 1999, effective date, the new warning is not required.

b. Currently Not Collectible, IRM 5.16.1.2.1

For levies imposed after December 31, 1999, I.R.C. § 6343(e) requires the Service to release levies as soon as practicable on salary or wages if the Service and taxpayer agree that the tax is not collectible. The intention of this provision is to prevent the I.R.S. from continuing to levy on a taxpayer's wages for the pay periods after it has determined that the taxpayer is unable to pay the tax. S. Rep. No. 105-174. The language of the statute specifically refers to "salary or wages". It is clear that the proposed [redacted] Litigation pay-out is not within the type of regular, periodic payment for services envisioned by Congress when it enacted this statute.

c. Notice of Right to CDP Hearings, IRM 5.11.1.2.1(4)

For any levy served after January 18, 1999, the taxpayer must be given a right to a hearing. I.R.C. § 6330. Since the "levy" was made before the effective date, CDP notices are not required.

CONCLUSION

The I.R.S. made its levy on 4-22-95, when it first served a Form 668-A on [redacted]. That levy served to attach to [redacted]'s obligations arising out of its tortious conduct occurring on [redacted] and included all future distributions from both qualified [redacted]. That levy served to attach for the taxpayers and periods listed on the attached disk. Subsequently served Forms 668-A are updates of the earlier levy as to those taxpayers and periods. The Service can accommodate [redacted]'s request to specify the fund name and attach updated disks as to those taxpayers and periods without triggering the notice requirements of RRA '98.

However, as to taxpayers and/or periods added after the [redacted][2] update the Form 668-A will constitute a new levy and the RRA '98 requirements must be met.

For this reason, we request that future disks separate the taxpayers into categories, dividing the listings between those taxpayers for whom you are making an update and those for whom the Form 668-A constitutes the "levy". This will allow you to more easily defend any claims by taxpayers that the proper noticing procedures were not followed. Please advise, as soon as possible, if this is impracticable, for any reason.

This opinion was coordinated with the Office of Chief Counsel, PA:CBS:B1.

Feel free to contact me, at extension 6466, if you have any further questions.

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[2] We reference the [redacted] rather than the [redacted] Form 668-A because the latter form was specifically addressed to the "[redacted]" rather than [redacted] and has been used by the [redacted] in its database for that fund. Here, we are interested in establishing a valid levy database for the [redacted] fund.